FOR ARGUMENT

Supreme Court, U.S.
FILED
FEB 11 1985
ALEXANDER L. STEVAS
CLERK

No. 84-465

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DR. LEE ROY BLACK,
Director of the Missouri Department of
Corrections and Human Resources,

DICK D. MOORE,
Chairman, Missouri Board of Probation
and Parole,

Petitioners,

v.

NICHOLAS JAMES ROMANO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF

OF COUNSEL:
ARMSTRONG, TEASDALE,
KRAMER & VAUGHAN

JORDAN B. CHERRICK
611 Olive Street
Suite 1900
St. Louis, Missouri 63101
Telephone: (314) 621-5070
Counsel of Record for Respondent
(Appointed by this Court)

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the due process clause of the fourteenth amendment required the Missouri trial court to consider on the record alternatives to incarceration, or state the reasons for its decision, as a prerequisite to revoking respondent's probation and imposing a twenty year prison term based upon conduct for which respondent was ultimately charged and convicted of careless driving and fined $100, which conduct was totally unrelated to the offense for which respondent was incarcerated, namely, the sale of marijuana?

2. Whether the district court and the Eighth Circuit were correct in ordering respondent released from all custody and in not allowing petitioners to hold a new, retrospective probation revocation hearing, after respondent's probation term has already expired under Missouri law, to cure a constitutional defect that occurred in respondent's probation revocation hearing almost eight years ago?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	vi
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
I. Procedural History	2
II. Facts Relating To Romano's Guilty Plea And Sentencing Hearings	4
III. Facts Relating To Romano's Probation Revocation Hearing of July 18, 1977	6
SUMMARY OF THE ARGUMENT	12
ARGUMENT	14
I. The District Court And Eighth Circuit Correctly Held That The Missouri Trial Court Violated Respondent's Fourteenth Amendment Due Process Rights	14
A. In *Gagnon* v. *Scarpelli* and *Morrissey* v. *Brewer*, This Court Held That The Fourteenth Amendment Due Process Clause Requires A Trial Court To Consider On The Record Alternatives To Incarceration, Or State The Reasons For Its Decision, As A Prerequisite To Revoking Probation	14
B. Federal And State Courts Have Uniformly Held That The Fourteenth Amendment Due Process Clause Requires A Trial Court To Consider On The Record Alternatives To Incarceration, Or State The Reasons For Its Decision, As A Prerequisite To Revoking Probation	18
C. Numerous Experts Have Endorsed The Modern Penological View That Fundamental Fairness Requires A Trial Court To Consider Alternatives To Incarceration Before Revoking Probation	21

Table of Contents Continued

Page

D. *Bearden* v. *Georgia* Follows *Morrissey* And *Gagnon* In Holding That Due Process Requires A Trial Court To Consider Alternatives To Incarceration Before Revoking Probation 22

E. Due Process Must Protect The Mutual Interests Of The Probationer, State, And Society In Allowing Probationers To Successfully Complete Their Probation Terms 24

1. Romano, The State And Society Have Mutual Interests In Establishing Procedures To Ensure That Probation Is Not Arbitrarily Revoked 26

2. A Probationer's Liberty Interest Corresponds To The High Statistical Probability That He Or She Will Successfully Complete The Probation Term 27

3. Trial Courts Which Order Incarceration By Precipitously Revoking Probation Will Increase The Likelihood That The Probationer Will Become A Recidivist 28

4. The High Costs Of Incarceration And Overcrowded Prisons Reflect The State And Society's Interest In Requiring Judges To Carefully Consider Alternatives To Incarceration Before Revoking Probation 28

5. Petitioners Cannot Substantiate Their Claims That The Requirement To Consider Alternatives To Incarceration Before Revoking Probation Will Overburden The State Courts, Cause An Increase In Habeas Petitions, Or Create A Conflict Between The State And Federal Governments 30

6. If This Court Does Not Affirm Romano, Trial Courts May Begin To Revoke Probations For Any Violation, Jeopardizing The Future Of The Probation System 31

Table of Contents Continued

Page

F. Trial Courts Should Consider Alternatives To Incarceration Before Revoking Probation Unless The Conduct Which Constitutes The Probation Violation Compels The Court To Conclude That The Probationer Can No Longer Be Rehabilitated Or Supervised In The Community 32

G. Alternatives To Incarceration Should Be Considered In Administrative And Judicial Probation Revocation Proceedings 35

H. Sentencing And Probation Revocation Proceedings Are Constitutionally Distinguishable And Involve Different Factual Issues 36

I. The Requirement That A Judge Consider Alternatives To Incarceration Should Be Distinguished From The Probationer's Duty To Present Mitigating Evidence 37

J. Notwithstanding The Requirement To Consider Alternatives To Incarceration, Judge Whipple Abused His Discretion In Revoking Romano's Probation And Executing A Twenty Year Prison Sentence 38

K. The District Court And The Eighth Circuit Applied The Correct Standard Of Review And Properly Decided Not To Order An Evidentiary Hearing To Give The Missouri Trial Judge An Opportunity To Supplement The Record And Cure The Constitutional Errors In His Decision To Revoke Probation 39

II. The District Court And The Eighth Circuit Were Correct In Ordering Respondent Released From All Custody And In Not Allowing Petitioners To Hold A New, Retrospective Probation Revocation Hearing, After Respondent's Probation Term Has Already Expired Under Missouri Law, To Cure A Constitutional Defect That Occurred In Respondent's Probation Revocation Hearing Almost Eight Years Ago. 41

Table of Contents Continued

	Page
A. Missouri Law Supports The Lower Courts' Orders Releasing Romano From All Further Custody	41
B. Due Process Prevents The Missouri Courts From Holding A Retrospective Probation Revocation Hearing To Consider Events Which Occurred Almost Eight Years Ago	42
CONCLUSION	46
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Abel v. *Wyrick*, 574 S.W.2d 411 (Mo. 1978) (*en banc*) 20, 32

Alexander v. *Town & Country Estates, Inc.*, 535 F.2d 1081 (8th Cir. 1976) 18

Arciniega v. *Freeman*, 404 U.S. 4 (1971) (*per curiam*) 38

Atkins v. *Marshall*, 533 F. Supp. 1324 (S.D. Ohio 1982) 19

Barker v. *Wingo*, 407 U.S. 514 (1972) 43, 44

Bearden v. *Georgia*, 461 U.S. 660 (1983) 12, 22, 23, 32, 36, 37

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 30

Bordenkircher v. *Hayes*, 434 U.S. 357 (1978) 6

Burns v. *United States*, 287 U.S. 216 (1932) 38, 45

Butner v. *United States*, 440 U.S. 48 (1979) 42

Carradine v. *United States*, 420 A.2d 1385 (D.C. App. 1980) 19

Caton v. *Smith*, 486 F.2d 733 (7th Cir. 1973) 44

Chapman v. *California*, 386 U.S. 18 (1967) 33

Commonwealth v. *Vasquez*, 389 A.2d 111 (Pa. Super. 1978) 20

Cook v. *Commonwealth*, 176 S.E. 2d 815 (Va. 1970) .. 42

Douglas v. *Buder*, 412 U.S. 430 (1973) (*per curiam*) .. 38

Drope v. *Missouri*, 420 U.S. 162 (1975) 44

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) ..... *passim*

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 16

Haney v. *Eyman*, 399 P.2d 905 (Ariz. 1965) (*en banc*) 42

Hawaii v. *Nakamura*, 581 P.2d 759 (Hawaii 1978) ... 20

Iasigi v. *Van De Carr*, 166 U.S. 391 (1897) 45

In re Gault, 387 U.S. 1 (1967) 26

Jones v. *Cunningham*, 371 U.S. 236 (1963) 1

Kartman v. *Parratt*, 535 F.2d 450 (8th Cir. 1976) 33

Kent v. *United States*, 383 U.S. 541 (1966) 16, 17, 35

Lawrence v. *Smith*, 451 F. Supp. 179 (W.D.N.Y. 1978) 19, 26

Table of Authorities Continued

Page

Marchand v. *Director, U.S. Probation Office*, 421 F.2d 331 (1st Cir. 1970) 43

Mason v. *State*, 631 P.2d 1051 (Wyo. 1981) 20

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 25

Meachum v. *Fano*, 427 U.S. 215 (1976) 36

Moore v. *Stamps*, 507 S.W.2d 939 (Mo. Ct. App. 1974) (*en banc*) 35

Morishita v. *Morris*, 702 F.2d 207 (10th Cir. 1983) .. 17, 20

Morrissey v. *Brewer*, 408 U.S. 471 (1972) ..... *passim*

Paul v. *Davis*, 424 U.S. 693 (1976) 30

People v. *Amsbary*, 51 Cal. App. 3d 75 (1975) 42

Romano v. *Black*, 567 F. Supp. 882 (E.D. Mo. 1983), *aff'd*, 735 F.2d 319 (8th Cir. 1984) ..... *passim*

Romano v. *Black*, 735 F.2d 319 (8th Cir. 1984) .... *passim*

Romano v. *Wyrick*, 681 F.2d 555 (8th Cir. 1982) 39

Sincup v. *Blackwell*, 608 S.W.2d 389 (Mo. 1980) (*en banc*) 17, 20

Smith v. *Carnes*, 481 S.W.2d 242 (Mo. 1972) (*en banc*) 2

Solem v. *Helm*, 463 U.S. 277 (1983) 6

State v. *Austin*, 295 N.W.2d 246 (Minn. 1980) 20

State v. *O'Meal*, 569 P.2d 249 (Ariz. App. 1977) 19

State v. *Rideau*, 376 So.2d 1251 (La. 1979) 20

State v. *Ruby*, 650 P.2d 412 (Alaska App. 1982) 19

State ex rel. Strickland v. *Melton*, 165 S.E.2d 90 (W. Va. 1968) 42

State ex rel. Wagner v. *Ruddy*, 582 S.W.2 692 (Mo. 1979) (*en banc*) 3

Sumner v. *Mata*, 455 U.S. 591 (1982) 40

Tate v. *Short*, 401 U.S. 395 (1971) 23

United States v. *Bazzano*, 712 F.2d 826 (3d Cir. 1983) (*en banc*) *cert. denied, sub nom. Mollica* v. *United States* ___ U.S. ___, 104 S.Ct. 1439 (1984) 20, 21

United States v. *Burkhalter*, 588 F.2d 604 (8th Cir. 1978) 20

Table of Authorities Continued

Page

United States v. *Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975) (*en banc*) 25

United States v. *Diaz-Burgos*, 601 F.2d 983 (9th Cir. 1979) 19

United States v. *Martinez*, 650 F.2d 744 (5th Cir. 1981) 17, 19

United States v. *Murray*, 275 U.S. 347 (1928) 28

United States v. *Reed*, 573 F.2d 1020 (8th Cir. 1978) 15, 19, 29

United States ex rel. Sims v. *Sielaff*, 563 F.2d 821 (7th Cir. 1977) 43

United States v. *Stine*, 675 F.2d 69 (3d Cir.), *cert. denied*, 458 U.S. 1110 (1982) 20, 21

Vitek v. *Jones*, 445 U.S. 480 (1980) 16

Williams v. *Illinois*, 399 U.S. 235 (1970) 23

Wolff v. *McDonnell*, 418 U.S. 539 (1974) 16, 26, 38

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. CONST., Amendment XIV, § 1; ..... *passim*

28 U.S.C. § 2254 ..... 1, 40

28 U.S.C. § 2243 ..... 1, 45

Mo. Rev. Stat. § 559.012 (1978) 1, 24, 1a

Mo. Rev. Stat. § 549.071.1 (1963, as amended 1967), repealed by L. 1982, at 438, § A 1, 2, 1a

Mo. Rev. Stat. § 549.101.1 (1963, as amended 1965), repealed by L. 1977, at 658, § 1, eff. January 1, 1979 ..... 2, 17, 2a

Mo. Rev. Stat. § 549.111.1 (1963, as amended 1967), repealed by L. 1977, at 658, § 1, eff. January 1, 1979 ..... 2, 41, 3a

SECONDARY AUTHORITIES

A. Campbell, *Law of Sentencing* (1978) 29

ABA STANDARDS FOR CRIMINAL JUSTICE (2nd Ed. 1980) 6, 15, 21-22, 24, 25, 28, 29

Table of Authorities Continued

Page

ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1981), (1982), and (1983) 5, 27

Arenella, *Rethinking The Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L. REV. 185 (1983) 26

BUREAU OF JUSTICE STATISTICS BULLETIN, PUB. NO. NCJ-92949, PRISONERS IN 1983 (April, 1984) 29

BUREAU OF JUSTICE STATISTICS BULLETIN, PUB. NO. NCJ-94776, PROBATION AND PAROLE 1983 (September, 1984) 31

BUREAU OF JUSTICE STATISTICS, PUB. NO. NCJ-87068, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA (1983) ... 29, 31

Clarke, *What is the Purpose of Probation and Why Do We Revoke It?*, 25 CRIME & DELINQ. 409 (1979) 22, 34

D. Gottfredson, L. Wilkins, P. Hoffman, *Guidelines for Parole and Sentencing* (1978) 22

DiCerbo, *Why Should Probation Be Revoked?*, 30 FEDERAL PROBATION 11 (1966) 22

F. Remington, D. Newman, E. Kimball, M. Melli and H. Goldstein, *Criminal Justice Administration, Materials and Cases* (1969) 15, 22

J. Barbour, A. Sapp, R. Holden, Offender Performance and Characteristics: Missouri Adult Probation, 1972-74 (Executive Summary) (August 1983) (Romano's Eighth Circuit Br., Addendum I) (lodged with this Court) 27

M. Gottfredson, D. Gottfredson, *Decisionmaking in Criminal Justice: Toward the Rational Exercise of Discretion* (1980) 22, 24

M. Munson, Probation Performance on Assignments to the Missouri Board of Probation and Parole, 1970-1972 (1977) (Romano's Eighth Circuit Br., Addendum H) (lodged with this Court) 27

Table of Authorities Continued

Page

N. Cohen and J. Gobert, *The Law of Probation and Parole* (1983) 24, 29, 36

NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS (1973) Standard 5.4 22

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT § 3-310 10 U.L.A. (1984) 22

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections (1967) 26, 28

JURISDICTION

Petitioners' jurisdictional statement requires supplementation. During the pendency of Romano's second habeas petition in the federal courts, the State of Missouri placed Romano on a parole term which expires in 2002. Eighth Circuit Designated Record at 89 [hereinafter cited as R.]. As a parolee, Romano was in "custody" under 28 U.S.C. Section 2254. *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963). In granting respondent a writ of habeas corpus, the district court and Eighth Circuit ordered Romano released from the custody of the Missouri Department of Probation and Parole and the Missouri Department of Corrections and Human Resources. Petitioners have never attempted to stay the execution of the mandates of the lower federal courts.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent has included quotations from the pertinent constitutional and statutory provisions in Appendix A to Respondent's Brief In Opposition To The Petition For A Writ of Certiorari. These provisions include the following:

1. U.S. CONST., amendment XIV, § 1;
2. 28 U.S.C. § 2254(a)-(d); and
3. 28 U.S.C. § 2243.

Respondent has included pertinent quotations in the Appendix to this brief from the following Missouri statutes:

1. Mo. Rev. Stat. § 559.012 (1978);
2. Mo. Rev. Stat. § 549.071.1 (1963, as amended 1967), repealed by L. 1982, at 438, § A;

3. Mo. Rev. Stat. § 549.101.1 (1963, as amended 1965), repealed by L. 1977, at 658, § 1, eff. January 1, 1979;

4. Mo. Rev. Stat. § 549.111.1 (1963, as amended 1967) repealed by L. 1977, at 658, § 1, eff. January 1, 1979.

STATEMENT OF THE CASE

Petitioners have presented a misleading statement of the case by mischaracterizing and omitting critical facts. Rather than restating the undisputed facts, respondent's statement of the case will only correct the inaccuracies in petitioners' presentation.

I. Procedural History

On December 10, 1974, respondent, Nicholas James Romano, was arrested for transferring and selling marijuana. Joint Appendix at 13, 31 [hereinafter cited as J.A.], Tr. at 6, 32. On November 15, 1977, Romano entered guilty pleas before Judge Whipple to two counts of an indictment alleging that Romano transferred (Count I) and sold (Count II) marijuana. J.A. at 11-12, Tr. at 2, 3, 4. On April 13, 1977, Judge Whipple sentenced Romano to two concurrent twenty year terms of imprisonment, but suspended execution of the sentence and placed Romano on probation for five years, the maximum term allowed under Missouri law. J.A. at 41-42, 46-47, Tr. at 46, 53, 54.[1]

---

[1] Contrary to petitioners' assertion, Br. at 37, Romano's probation term was five, *not* ten years. J.A. at 41, 43, Tr. at 44, 48. Indeed, Judge Whipple acknowledged that Missouri law precluded him from ordering a probation term in excess of the five year maximum term for felonies. J.A. at 43, Tr. at 48. *See* Mo. Rev. Stat. 549.071.1, (1963, as amended 1967), repealed by L. 1982, at 438, § A; *Smith* v. *Carnes*, 481 S.W.2d 242 (Mo. 1972) (*en banc*) (statutory maximum probation term includes extensions).

On July 18, 1977, Judge Whipple revoked Romano's probation based upon conduct for which Romano, after pleading not guilty, was ultimately charged and convicted of careless driving and fined $100 and costs. After revoking Romano's probation, Judge Whipple executed the twenty year sentence which he had originally imposed and suspended.[2]

The district court described the "extraordinary story" of Romano's futile efforts to seek post-conviction relief in the state courts. Appendix to Petition For A Writ of Certiorari [hereinafter cited as P.A.] at 38-41, *Romano* v. *Black*, 567 F. Supp. 882, 884-85 (E.D. Mo. 1983). The record reflects that not a single Missouri trial or appellate court ever considered the merits of Romano's numerous *pro se* petitions. Moreover, petitioners concede that a Missouri trial judge denied Romano's post-conviction relief petition on improper procedural grounds and also formally advised Romano to pursue further improper procedural remedies. Petition For A Writ Of Certiorari at 3 [hereinafter cited as Pet.]. Romano's reliance on this trial judge's mistaken directions delayed the adjudication of his claims for two to three years.[3]

---

[2] After ruling that Romano's probation should be revoked, Judge Whipple was required, under Missouri law, to execute the twenty year sentence which he had originally imposed and suspended. Judge Whipple had no authority to reduce this sentence. *See State ex rel. Wagner* v. *Ruddy*, 582 S.W.2d 692, 693-95 (Mo. 1979) (*en banc*); Mo. Rev. Stat. § 549.101.1 (1963, as amended 1965) (repealed by L. 1977, at 658, § 1, eff. January 1, 1979) (applicable law at the time of Romano's revocation hearing).

[3] Petitioners mislead this Court when they state that, in his initial federal court appeal in 1982, Romano raised "for the first time" the claim that his probation revocation hearing was unconstitutional. Br. at 4-5. To the contrary, in 1980 Romano had challenged the constitutionality of his probation revocation hearing in his state habeas corpus petition. R. at 58-62.

II. Facts Relating To Romano's Guilty Plea And Sentencing Hearings

The following facts emerge from Romano's guilty plea and sentence hearings, J.A. at 10-47, Tr. at 1-54:

1. Romano pleaded guilty to the charge of transferring and selling marijuana in excess of 35 grams. J.A. at 10-12, Tr. at 2-4. The marijuana had a value of approximately $3,000 to $3,200. J.A. at 36, Tr. at 39.

2. Contrary to petitioners' assertion, Br. at 5, the "heroin" involved in Romano's sale of marijuana actually consisted of a baking soda and pancake mix. Romano's Eighth Circuit Br., Addendum A, Supplemental Pre-Sentence Investigation Report at 1 (lodged with this Court). The State of Missouri only sought an indictment for Romano's transfer and sale of marijuana. J.A. at 11-12, Tr. at 2-3.

3. Romano pleaded guilty even though he may have had a meritorious entrapment defense as the State of Missouri had used informers to introduce Romano to various drugs and also used informers to arrange for the actual marijuana sale for which Romano was convicted. J.A. at 15-16, Tr. at 9-10.

4. Romano had no prior felony convictions, J.A. at 31, Tr. at 31-32, and had only a very insignificant misdemeanor conviction for which he received a $50 fine with no term of imprisonment. Romano's Eighth Circuit Br., Addendum B-1, Supplemental Pre-Sentence Investigation Report at 2 (lodged with this Court). Indeed, his prior record was so clean that the Adult Face Sheet, prepared by the Missouri Department of Social Services, states that Romano had no prior "prison" or "non-prison" sentences. R. at 78.

5. During the twenty eight month period between Romano's arrest and his sentencing hearing (December,

1974 to April, 1977), Romano did not commit any criminal offenses with the exception of a minor traffic ticket he received in February, 1977. J.A. at 31, Tr. at 32.

6. Judge Whipple sentenced Romano to an excessive prison term of twenty years even though the pre-sentence investigation report had recommended only five years, Romano's Eighth Circuit Br., Addendum B-2, Pre-Sentence Investigation Report at 5 (lodged with this Court), and the prosecutor had recommended ten years, J.A. at 36, Tr. at 39.[4] Judge Whipple's bizarre sentence indicates an abuse of discretion for two reasons:

(a) The prison term is excessive on its face based on the nature of Romano's offense.[5]

---

[4] Romano also presented substantial evidence at his sentencing hearing that his conviction did not require imprisonment. Romano's employer, Mike Atkinson, testified that Romano "does a good job . . . he's conscientious about his work and he's never been any problems [*sic*]." J.A. at 30, Tr. at 30. In addition, Romano tendered to Judge Whipple Dr. Sheldon Silk's favorable psychological evaluation. J.A. at 34, Tr. at 36.

[5] A 1983 study of the average prison sentence for specific offense categories for defendants sentenced in the United States district courts reveals that the average sentence for a felony marijuana conviction was 55.1 months as compared to the 240-month sentence Romano received from Judge Whipple. *Annual Report of the Director of the Administrative Office of the United States Courts*, 343-45 (1983). Romano's sentence exceeded the average sentence for *every* federal offense category, including, for example, first degree murder, rape and kidnapping. *Id.* These statistics do not differentiate between first and subsequent offenses, which makes Romano's 240-month sentence for a first felony offense even more shocking. In light of the record and these statistics, one wonders how petitioners can describe Judge Whipple's sentence as "lenient." Br. at 33.

Members of this Court have expressed dismay at the injustice inherent in sentences which are grossly disproportionate to the

(b) Suspending execution of an extraordinarily severe prison sentence and granting probation, which ostensibly indicates that Judge Whipple believed Romano could be rehabilitated within the community and did not require incarceration, reflects Judge Whipple's misunderstanding of the purposes of probation.[6]

7. Judge Whipple's statements on the record indicate that he "harbored a disposition to send Romano to jail for any probation violation, regardless of the nature of the violation and without regard to any other possible options." P.A. at 23, *Romano* v. *Black*, 735 F.2d at 319, 323 (8th Cir. 1984) (quoting from *Romano*, 567 F. Supp. at 886). *See also Romano*, P.A. at 16-18, 735 F.2d at 322.

III. Facts Relating To Romano's Probation Revocation Hearing Of July 18, 1977

Judge Whipple revoked Romano's probation because he believed sufficient evidence existed to support the

---

crime. *Cf. Solem* v. *Helm*, 463 U.S. 277 (1983) (eighth amendment bars sentences which are significantly disproportionate to the crime); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 368-73 (1978) (Powell, J., dissenting). (Justice Powell opined that the prosecutor's plea bargaining conduct violated due process, causing defendant to receive an excessive and unjust sentence.)

[6] The ABA has commented on the unfairness of Judge Whipple's sentence:

> [A] Draconian tendency to impose severe sentences may exist where the court is imposing a suspended sentence that it never expects will be served, since in such instances the court may understandably tend to focus primarily on the value of the suspended sentence as a deterrent threat by which to caution the offender. But the paradoxical result can be that those offenders initially judged more suited for probation thus wind up serving longer periods of confinement.

ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 18-2.3, Commentary at 18-82 to 83 (2d ed. 1980) [hereinafter cited as ABA STANDARDS].

State of Missouri's allegation that Romano had committed the crime of leaving the scene of an accident. J.A. at 102-03, 107-10, Tr. at 134, R. at 47-49. Judge Whipple based his findings on the disputed facts relating to an automobile accident on June 15, 1977, in which Romano's car allegedly struck his close friend, Timothy Bradley, outside of the Stein Club in Columbia, Missouri. The probation revocation transcript, however, casts substantial doubt on Judge Whipple's factual finding that Romano, and not his girlfriend, was the driver of the car which struck Bradley as well as on his legal finding that Romano committed the crime of leaving the scene of an accident.

Timothy Bradley, the victim of the accident who suffered only minor injuries, testified that he could not identify the driver of the car which struck him. J.A. at 54, Tr. at 63. Gerald Saunders, an eyewitness to the accident, testified that Jody Seificas, Romano's girlfriend, left the car from the driver's side. J.A. at 59, Tr. at 72-73. Saunders thought that Seificas was the driver of the car. J.A. at 61, Tr. at 74. Saunders also stated that Terry DeHaven, a passenger in the car, told him later that Romano was driving the car. J.A. At 64, Tr. at 79.

DeHaven's recollection, however, was not credible because DeHaven testified that he was drunk ("totally smashed") prior to leaving the Stein Club with Romano. J.A. at 57, Tr. at 69. DeHaven stated that he had "passed out" in Romano's car and only awoke after the impact of the accident. J.A. at 55-56, Tr. at 65-66. Finally, DeHaven testified that he did not know the identity of the car's driver. J.A. at 58, Tr. at 69. In light of DeHaven's testimony, it is difficult to understand how Judge Whipple could have relied on his statement to Saunders that Romano was driving the car. J.A. At 108; R. at 47-49.

Judge Whipple also based his decision upon the "testimony" of Jody Seificas. J.A. at 109; R. at 47-49. Seificas' testimony related to the critical fact issue of the identity of the driver of the car which struck Bradley. Seificas repeatedly exercised her fifth amendment right against self-incrimination and refused to answer numerous questions about the accident at the revocation hearing. J.A. at 66-67, Tr. at 82-84. Upon being called to testify a second time during the hearing, Seificas replied, "I admit that," to an extremely confusing compound question concering whether she had spoken with a police officer about the accident *and* whether she had told him that she was a passenger in the car. J.A. at 90-91, Tr. at 116-17.[7] She later testified that she did not understand the compound question and, after the question was asked a second time, Seificas refused to answer, invoking her fifth amendment privilege. J.A. at 90-91, Tr. at 117-18. Judge Whipple, however, ruled that Seificas had waived her fifth amendment privilege and also stated that he considered her testimony "material" in his finding that Romano was the driver of the car which struck Bradley. J.A. at 109, R. at 47-49.[8]

Judge Whipple also relied on the testimony of members of Timothy Bradley's family who all offered almost identical testimony. Bradley's mother, father, and sister were

---

[7] Judge Whipple never explained how Seificas' response, "I admit that," implied that she was a passenger in the car. Assuming, contrary to Seificas' statement, that she understood Prosecutor Seitz' compound question, she may have only been admitting that she had spoken with a police officer on the night of the accident. Judge Whipple unfairly interpreted Seificas' ambiguous response as an admission that Seificas also told the police officer that she was a passenger in the car.

[8] Charles Franklin, an attorney present in the courtroom at the revocation hearing, supported Romano's position that Seificas did not waive her privilege against self-incrimination. J.A. at 92-93, Tr.

visiting Timothy in his hospital room on Sunday morning, June 15, 1977, approximately ten hours after the accident occurred. Romano arrived to visit Timothy. According to Bradley's mother, Romano told Timothy, "It's too bad you jumped in front of me." J.A. at 79, Tr. at 101.[9]

The family's testimony was not credible. Both of Bradley's parents acknowledged that they had retained a local law firm to represent Timothy in a personal injury action arising from the car accident. J.A. at 80, 88, Tr. at 102-03, 113. Timothy Bradley offered no testimony concerning his alleged conversation with Romano about the accident. J.A. at 49-54, 80, Tr. at 57-64, 102. Moreover, Greg Fallon testified that he was also in Bradley's hospital room during Romano's visit. J.A. at 96, Tr. at 124. While Fallon recalled the conversation between Bradley and Romano and was present for the entire conversation, he did not recall hearing Romano make any statements to Bradley concerning the car accident. J.A. at 96, Tr. at 125.

Judge Whipple evaluated the evidence for only three minutes, J.A. at 102, Tr. at 134, before ruling that:

1. Romano was the driver of the car which struck Bradley;

---

at 119-20. Franklin's unusual appearance and statements bolster Romano's contention that Judge Whipple abused his discretion in revoking Romano's probation. In a colloquy with the court, Franklin strenuously objected: "Sir, I have no basis. I have no standing at all to object. I wish I could but I can't. The only thing I can do is inform the Court that ah . . . my decision is that she has not waived her . . . Fifth Amendment privileges." J.A. at 92-94, Tr. at 121.

[9] Mary Ann Bradley offered this testimony verbatim. Bradley's sister and father offered almost identical testimony. J.A. at 79, 80, 83, Tr. at 107, 113.

2. Romano committed the crime of leaving the scene of an accident and, therefore, violated the general condition of his probation agreement in which he had agreed to obey all of the laws of the State of Missouri;[10] and

3. Romano's probation should be revoked and his underlying twenty year prison term should be executed. J.A. at 103-04, Tr. at 135-36, J.A. at 107-10, R. at 47-49.

Judge Whipple found that Romano committed the crime of leaving the scene of an accident despite the evidence which indicated that Romano lacked the requisite intent. Judge Whipple never explained the reason Romano allowed all of his passengers to leave the car to attend to Bradley. The record also reflects that numerous bystanders were present at the parking lot of the Stein Club who attended to Bradley. J.A. at 49, 68, 73, Tr. at 57, 85, 92. Judge Whipple also does not explain the reason Romano visited his close friend, Bradley, at his hospital room only ten hours after the accident. Romano was ultimately arrested in Bradley's hospital room. J.A. at 89, Tr. at 115.

Romano's conduct proved that he did not intend to escape responsibility for his actions.[11] Judge Whipple did

---

[10] The State of Missouri required Romano to obey three special conditions of probation which were related to his underlying marijuana conviction and required him to: (1) submit to a drug screening test on demand; (2) restrict his travel; and (3) allow a law enforcement officer to search his personal property at any time. J.A. at 43-44, Tr. at 49, 50. The state never alleged that Romano violated one of these special probation conditions.

[11] The state's failure to prosecute Romano for leaving the scene of an accident confirms that Judge Whipple lacked evidentiary support for his ruling. The state reduced the hit and run charge to careless driving, R. at 52, of which Romano was ultimately convicted. R. at

not even acknowledge this substantial mitigating evidence when he revoked Romano's probation. *See Romano*, P.A. at 20, 735 F.2d at 323.

The probation revocation transcript and the court's "Memorandum of Findings," J.A. at 107-10, reflect that Judge Whipple revoked Romano's probation without considering alternatives to incarceration or explaining the reasons for his ruling. Judge Whipple never explained why the obvious alternatives to incarceration (for example, fine, restitution, drivers' training classes, or public service work) would not be more appropriate than sending Romano to jail for twenty years. Judge Whipple also never discussed the rationale for his decision that Romano's driving offense, which had no relationship to Romano's marijuana conviction, compelled the conclusion

---

53. Romano did not receive this reduced charge as a result of a plea bargain because Romano pleaded "not guilty" and vigorously defended himself against the careless driving charge. R. at 53.

Petitioners unfairly seek to malign Romano by consistently drawing inferences from the record that have no factual basis. For example, petitioners "infer" from Saunders' general description of the movement of Romano's car that Romano "might have been intoxicated with some drug—alcohol, marijuana, or something else," Br. at 33, when Romano's car allegedly struck Bradley. Nothing in the record even remotely supports this incredible allegation. Petitioners also fail to state that Saunders' recollection of the accident is tainted by his admission of having "had a few beers" prior to his leaving the Stein Club. J.A. at 61, Tr. at 74.

Police officer Wright testified that Romano's car was found parked in the driveway of the Stein Club owner's house, only six blocks from the accident scene. J.A. at 71, 77, Tr. at 89-98. Petitioner's "infer" from this testimony that Romano drove away from the accident scene to conceal his mental condition. Br. at 33. A more reasonable inference is that Romano drove to his employer's house because he felt frightened in light of his status as a probationer.

that Romano could no longer be rehabilitated or supervised in the community and must, therefore, be incarcerated. *See Romano*, P.A. at 20-21, 47-51, 735 F.2d at 323, 567 F. Supp. at 886-87.

SUMMARY OF THE ARGUMENT

The Missouri trial court arbitrarily revoked respondent's probation without complying with *Gagnon* v. *Scarpelli*'s due process requirement that a trial court consider on the record alternatives to incarceration, or state the reasons for its decision, as a prerequisite to revoking probation. Numerous federal and state courts, as well as expert observers of the criminal justice system, have endorsed the modern penological view that courts should consider alternatives to incarceration before revoking probation.

In *Bearden* v. *Georgia*, this Court followed *Gagnon* in holding that due process requires a trial court to consider alternatives to incarceration before revoking the probation of an indigent who fails to make restitution. The case at bar offers this Court the opportunity to reexamine the application of the due process clause to all probation revocation proceedings.

The probationer has a substantial liberty interest, protected by due process, which should prevent a court from unfairly and arbitrarily revoking probation. Probation also satisfies the state's penological interests in rehabilitating and supervising criminal offenders within the community. Empirical evidence indicates that if probationers are unnecessarily incarcerated, the state and society will be burdened with serious social and fiscal problems. These problems include the greater likelihood that incarcerated persons will become criminogenic and recidivists as well as the high cost of prison overcrowding. Due

process procedures must, therefore, provide safeguards so that judges or hearing officers do not arbitrarily revoke probation.

Respondent respectfully proposes a due process test which will ensure that trial judges adhere to the proper criteria in their probation revocation decisions. Trial courts should consider alternatives to incarceration before revoking probation unless the conduct which constitutes the probation violation compels the court to conclude that the probationer can no longer be rehabilitated or supervised within the community.

Applying this test to the facts at bar, this Court should conclude that the Missouri trial judge erred in failing to consider alternatives to incarceration before revoking respondent's probation. Romano's alleged conduct which constituted his probation violation, careless driving, had no rational relationship to his underlying marijuana conviction. The careless driving offense did not compel the conclusion that Romano could no longer be rehabilitated or supervised in the community, and that he must, therefore, be incarcerated for twenty years.

As a result of his unconstitutional probation revocation hearing, Romano spent five and one-half years in jail. Romano's five year probation term expired in 1982. Under Missouri law, the state no longer has the jurisdiction or custody over Romano's person necessary to conduct a retrospective probation revocation hearing which conforms with due process.

Due process considerations also dictate that this Court should affirm the district court and Eighth Circuit's order releasing Romano from all further custody by the State of Missouri. Romano's efforts to gain post-conviction relief were hampered by the Missouri courts which delayed the timely adjudication of his constitutional claims. Due proc-

ess requires the courts to conduct a probation revocation hearing shortly after a violation occurs. It would be impractical and unfair to allow the state an opportunity to conduct a retrospective hearing concerning events which occurred almost eight years earlier. Justice requires that this Court affirm the lower courts' issuance of a writ of habeas corpus to Romano.

ARGUMENT

I. THE DISTRICT COURT AND EIGHTH CIRCUIT CORRECTLY HELD THAT THE MISSOURI TRIAL COURT VIOLATED RESPONDENT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

A. In *Gagnon* v. *Scarpelli* And *Morrissey* v. *Brewer*, This Court Held That The Fourteenth Amendment Due Process Clause Requires A Trial Court To Consider On The Record Alternatives To Incarceration, Or State The Reasons For Its Decision, As A Prerequisite To Revoking Probation.

In *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), this Court enunciated the minimum due process standards which a state must meet if it wishes to revoke an individual's probation. These standards comprise the "process" due to all probationers and guarantees that the state does not arbitrarily revoke a probationer's significant liberty interest. *Gagnon* recognized that a court must make *two* determinations in deciding whether to revoke an individual's probation: (1) whether the probation terms were actually violated; and (2) if the terms of the probation were violated, "[s]hould the parolee [probationer] be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?" *Gagnon*, 411 U.S. at 784 (citing *Morrissey* v. *Brewer*, 408 U.S. 471, 479-80 (1972)).[12]

---

[12] *Morrissey* established the due process requirements for parole revocation proceedings, and *Gagnon* applied these requirements to

In exploring the rationale for requiring a trial judge to consider alternatives to incarceration, *Gagnon* identified various competing interests:

> Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion—the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

411 U.S. at 785.

This Court emphasized that rehabilitation, not punishment, is the focus of the probation/parole system. "[T]he whole thrust of the probation/parole movement is to keep men in the community, working with adjustment problems there, and using *revocation only as a last resort* when treatment has failed or is about to fail." *Id.* (citing F. Remington, D. Newman, E. Kimball, M. Melli & H. Goldstein, *Criminal Justice Administration, Materials and Cases* 910-911 (1969)) (emphasis added). Probation should be revoked only when the trial court is convinced that the probation violator's conduct is so serious that he or she "cannot be counted on to avoid antisocial activity." *Morrissey*, 408 U.S. at 479.

---

probation revocation proceedings. *Gagnon*, 411 U.S. at 782 n.3. A probationer's due process rights are arguably stronger than a parolee's because a probationer has a higher statistical success rate than a parolee. *See United States* v. *Reed*, 573 F.2d 1020, 1024 (8th Cir. 1978). Also, many probationers have never been incarcerated. These probationers will not be exposed to the ill effects of prison life and are less likely to become recidivists. *See* ABA STANDARDS, *supra* Standard 18-2.3, Commentary at 18-76.

Gagnon and *Morrissey* also require the trial judge to consider alternatives to incarceration *on the record* so that an appellate court can meaningfully review the trial court's ruling.[13] Thus, the trial judge must provide "*a written statement . . . as to the evidence relied on and reasons for revoking [probation or] parole.*" *Gagnon*, 411 U.S. at 786 (citing *Morrissey*, 408 U.S. at 489) (emphasis added.)[14]

Gagnon translates the question of whether a probation violation occurred into the trial court's procedural duty to explain the evidence on which it relies in its ruling. 411 U.S. at 784, 786. The case translates the second question of whether alternatives to incarceration are appropriate into the trial court's procedural duty to explain its reasons for revoking probation. *Id.* "Alternatives" and "reasons" are logically related. One may define probation as an alternative to incarceration. An explanation of the

---

[13] Petitioners concede that *Morrissey* and *Gagnon* require the trial court to file a written statement explaining the evidence relied on *and* reasons for revoking probation. Br. at 13-14. Petitioners contend that Judge Whipple satisfied this due process requirement, *id.*, even though the record reflects the contrary conclusion. J.A. at 107-10.

[14] This Court has held in other contexts that due process requires an administrative body or court to make a written statement of the reasons for its decision. *See, e.g., Vitek* v. *Jones*, 445 U.S 480, 495 (1980) (factfinder must make a written statement of reasons for transferring inmate to mental hospital); *Wolff* v. *McDonnell*, 418 U.S. 539, 564 (1974) (factfinder must make written statement of reasons for prison disciplinary proceeding which results in loss of good-time credits); *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970) (decisionmaker should state reasons for terminating welfare benefits); *Kent* v. *United States*, 383 U.S. 541, 561 (1966) (juvenile court must state reasons underlying its order waiving jurisdiction).

reasons for revoking probation necessarily entails an explanation of why alternatives to incarceration are no longer viable.[15]

The Eighth Circuit correctly interpreted *Gagnon* when it held that Romano's probation revocation hearing violated his due process rights. P.A. at 11-24, 735 F.2d at 321-24. The record supports the Eighth Circuit's ruling. The transcript reveals that Judge Whipple never considered alternatives to incarceration. P.A. at 20-22, 49-51, 735 F.2d at 323, 567 F. Supp. at 884, 886. Judge Whipple's written "Memorandum of Findings" only contains a discussion of the evidence relating to the issue of whether Romano was the driver of the car which struck Bradley. J.A. at 107-10. Judge Whipple, however, never explained his *reasons* for revoking Romano's probation as is required under *Gagnon*. *Id.*[16]

---

[15] Missouri law recognizes the "last resort" nature of probation revocation by allowing a judge, after finding a violation, to continue the probation term with or without additional conditions. Mo. Rev. Stat. § 549.101.1 (1963, as amended 1967), repealed by L. 1977, at 658, § 1, eff. January 1, 1979 (the applicable law at the time of Romano's revocation hearing).

[16] A record is critical to protect the probationer's due process rights and to allow meaningful appellate review. *See, e.g., Kent* v. *United States*, 383 U.S. 541, 561 (1966) ("Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons . . . [I]t may not "assume" that there are adequate reasons. . . .")

Some courts have held that *Gagnon's* requirement of a *written* statement of reasons or alternatives to incarceration is satisfied if the judge or hearing officer dictates his or her findings into the record which can be transcribed for an appellate court's review. *See, e.g., United States* v. *Martinez*, 650 F.2d 744, 745 n.1 (5th Cir. 1981); *Morishita* v. *Morris*, 702 F.2d 207, 209 (10th Cir. 1983); *Sincup* v. *Blackwell*, 608 S.W. 2d 389, 393 (Mo. 1980) (*en banc*). If this Court adopts this interpretation of *Gagnon*, *Romano* should still be

B. Federal and State Courts Have Uniformly Held That The Fourteenth Amendment Due Process Clause Requires A Trial Court To Consider On The Record Alternatives To Incarceration, Or State The Reasons For Its Decision, As A Prerequisite To Revoking Probation.

Numerous federal and state courts which have considered the constitutional standards for probation revocation proceedings have followed the *Morrissey/Gagnon* requirement that a trial court must consider alternatives to incarceration, or state the reasons for its decision, as a prerequisite to revoking probation or parole.[17] We briefly

---

affirmed. The revocation transcript and the court's written memorandum of findings reflect that Judge Whipple did not consider alternatives to incarceration or offer a reasoned explanation to support his decision to revoke Romano's probation. *Romano*, P.A. at 20-22, 48-51, 735 F.2d at 323, 567 F. Supp. at 886-87.

[17] Petitioners now contend, *for the first time in this litigation*, that *Morrissey* and *Gagnon* do not require the trial judge to consider alternatives to incarceration before revoking probation. Br. at 8, 12, 21. In the lower courts, petitioners acknowledged that

> [i]t is clear that under the case law [,] probation revocation is a two-step process. The first step is a factual determination of whether one or more terms of the probation have been violated. If a probation violation is found, the second question to be considered is whether the probationer should be incarcerated or whether other steps should be taken to protect society and improve chances of rehabilitation. (citing *Gagnon* and *Morrissey*).

Petitioners' Eighth Circuit Br. at 1 (lodged with this Court). Petitioners primarily litigated below the issue of whether the trial judge must consider alternatives to incarceration "on the record."

This Court should refuse to allow petitioners to change their legal position. *See, e.g., Alexander* v. *Town & Country Estates, Inc.*, 535 F.2d 1081, 1082 n.1 (8th Cir. 1976) (appellate court will not decide a case on a legal theory on which counsel advanced a contrary position in the court below).

summarize the holdings of selected federal cases: *United States* v. *Martinez*, 650 F.2d 744, 745 (5th Cir. 1981) (district court erred in failing to make written statement of reasons for revoking probation; "pro forma language and routine phrases" will not satisfy due process); *United States* v. *Diaz-Burgos*, 601 F.2d 983, 985 (9th Cir. 1979) (due process requires court to consider whether probation violation "warrants revocation and, if so, what sentence shall be imposed"); *United States* v. *Reed*, 573 F.2d 1020, 1024-25 (8th Cir. 1978) (before revoking probation, the court must consider whether violations are sufficiently serious to justify revocation and whether alternatives to incarceration would be more appropriate); *Atkins* v. *Marshall*, 533 F. Supp. 1324, 1329 (S.D. Ohio 1982) (in expressing its reasons for revoking probation, the trial court must consider whether reincarceration would best improve the probationer's hopes of rehabilitation); *Lawrence* v. *Smith*, 451 F. Supp. 179, 189 (W.D.N.Y. 1978) (parole board must explain its reasons for revoking parole rather than taking alternative action).

We briefly summarize the holding of selected state cases: *State* v. *Ruby*, 650 P.2d 412, 414 (Alaska App. 1982) (proof of probation violation is insufficient to revoke probation as the court must also determine whether rehabilitation of petitioner would be furthered by alternatives to imprisonment such as continuation of petitioner's probation); *State* v. *O'Meal*, 569 P.2d 249, 251 (Ariz. App. 1977) (second facet of probation revocation hearing requires trial court to decide whether "continuation of appellant's probationary status [would] be at odds with the need to protect society and society's interest in appellant's rehabilitation."); *Carradine* v. *United States*, 420 A.2d 1385, 1388 (D.C. App. 1980) (*Gagnon* requires probation revocation proceeding to include a consideration of whether alternatives to incarceration are viable);

Hawaii v. *Nakamura*, 581 P.2d 759, 763 (Hawaii 1978) (Abuse of discretion for court not to consider alternatives to incarceration, especially where punishment for revocation is grossly disproportionate to the violation); *State* v. *Rideau*, 376 So.2d 1251, 1258 (La. 1979) (trial court "abdicate[ed] its responsibility" and violated probationer's due process rights when it failed "to determine whether the drastic remedy of revocation was appropriate"); *State* v. *Austin*, 295 N.W. 2d 246, 250 (Minn. 1980) (court must "find that the need for confinement outweighs the policies favoring probation" before revoking probation); *Abel* v. *Wyrick*, 574 S.W.2d 411 (Mo. 1978) (*en banc*) (abuse of discretion as a matter of law for a court to revoke probation without considering alternatives to incarceration, especially when probation violation is unrelated to underlying conviction); *Commonwealth* v. *Vasquez*, 389 A.2d 111, 113-14 (Pa. Super. 1978) (trial court erred in revoking probation and parole as it made no specific finding that probation-parole violation deserved imprisonment rather than rehabilitation alternative); *Mason* v. *State*, 631 P.2d 1051, 1055 (Wyo. 1981) (after probation violation is found, due process requires court to make a second inquiry to determine whether probation should be revoked).[18]

---

[18] Petitioners erroneously cite *United States* v. *Burkhalter*, 588 F.2d 604 (8th Cir. 1978); *Sincup* v. *Blackwell*, 608 S.W.2d 389 (Mo. 1980) (*en banc*); *Morishita* v. *Morris*, 702 F.2d 207 (10th Cir. 1983); *United States* v. *Bazzano*, 712 F.2d 826 (3d Cir. 1983) (*en banc*) *cert. denied, sub nom. Mollica* v. *United States*, ___ U.S. ___, 104 S. Ct. 1439 (1984); and *United States* v. *Stine*, 675 F.2d 69 (3d Cir.) *cert. denied* 458 U.S. 1110 (1982), for the proposition that lower courts have interpreted *Morrissey* and *Gagnon* not to require sentencing judges to consider alternatives to incarceration before revoking probation. Br. at 16-20.

In *Burkhalter*, the Eighth Circuit agreed that *Gagnon* requires the court to consider alternatives to incarceration and to order

C. Numerous Experts Have Endorsed The Modern Penological View That Fundamental Fairness Requires A Trial Court To Consider Alternatives To Incarceration Before Revoking Probation.

Numerous experts have endorsed the *Morrissey/Gagnon* due process requirement that a trial court consider alternatives to incarceration before revoking probation. The American Bar Association has opined that "intermediate steps should be considered in *every* [probation revocation] case as possible alternatives to the imposition of total confinement." ABA STANDARDS FOR CRIMI-

---

revocation "only as a last resort." 588 F.2d at 606. The court held that the revocation was proper because the trial court found that the probationer intentionally and consistently violated the special conditions of his probation which indicated that he could no longer be rehabilitated in the community. *Id.* at 607.

Morishita held that "written findings are constitutionally required only if the transcript and the record before the judge do not enable a reviewing court to determine the basis of the judge's decision to revoke probation." 702 F.2d at 210. In the case at bar, however, the transcript and Judge Whipple's written findings reflect that he did not state the reasons for his decision or consider alternatives before revoking Romano's probation.

Bazzano did not even address the issue of alternatives to incarceration. The Third Circuit held that after revoking probation, the trial court need not state its reasons for executing the original suspended sentence which it had given to the probationer after his initial conviction. 712 F.2d at 838-39. This holding applies the general rule that trial judges have no duty to explain the reasons underlying their *sentencing* decisions.

Stine affirmed the constitutionality of probation conditions which require psychological counseling. 675 F.2d at 72. The court also held that the probation revocation was proper because the record reflected that it was the "only alternative." *Id.*

NAL JUSTICE, Standard 18-7.3(d), (2d ed. 1980) (emphasis added) [hereinafter cited as ABA STANDARDS].[19]

D. *Bearden* v. *Georgia* Follows *Morrissey* And *Gagnon* In Holding That Due Process Requires A Trial Court To Consider Alternatives To Incarceration Before Revoking Probation.

Bearden v. *Georgia*, 461 U.S. 660 (1983), held that due process requires sentencing judges to consider alternatives to incarceration before automatically revoking probation for an indigent's failure to pay a fine or make restitution. 461 U.S. at 672. This Court carefully placed its limited holding in the context of the well-entrenched *Morrissey/Gagnon* due process guidelines. "Under our holding the sentencing court must focus on criteria

---

[19] *See also* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT, § 3-310, 10 U.L.A. (1984); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS, Standard 5.4 (1973); Clarke, *What Is The Purpose of Probation and Why Do We Revoke It?*, 25 CRIME & DELINQ. 409 (1979); F. Remington, D. Newman, E. Kimball, M. Melli and H. Goldstein, *Criminal Justice Administration, Materials and Cases* 910 (1969) (cited in *Gagnon*, 411 U.S. at 784 n.7); DiCerbo, *Why Should Probation Be Revoked?*, 30 FEDERAL PROBATION 11-17 (1966); *see generally* M. Gottfredson and D. Gottfredson, *Decisionmaking In Criminal Justice: Toward The Rational Exercise of Discretion* 212, 214, 335 *et seq.* (1980); D. Gottfredson, L. Wilkins, P. Hoffman, *Guidelines For Parole and Sentencing* 1, 119 *et seq.* (1978).

Petitioners cite numerous academic authorities to support, presumably by negative inference, their argument that *Morrissey* and *Gagnon* do not require trial courts to consider alternatives to incarceration. Br. at 20 n.1. These authorities are irrelevant because while they discuss *Morrissey* and *Gagnon* generally, they do not even purport to address the issue of alternatives to incarceration.

typically considered daily by sentencing courts throughout the land in probation revocation hearings: whether the defendant has demonstrated sufficient efforts to comply with the terms of probation and whether non-imprisonment alternatives are adequate. . . ." *Id.*, 461 U.S. at 673 n.12.

Petitioner Bearden occupied the position of both an indigent and a probationer which gave him *two* due process interests. As Bearden's indigency status was the central factual issue, this Court relied on Justice Harlan's analyses of an indigent's due process rights in *Williams* v. *Illinois*, 399 U.S. 235, 259 (1970) and *Tate* v. *Short*, 401 U.S. 395, 401 (1971). *Bearden*, U.S. at 665, 674 (majority opinion); 461 U.S. at 676 (concurring opinion). The Bearden majority also cited *Morrissey* and *Gagnon* to establish the due proces foundation for this Court's opinion. 461 U.S. at 666 n.7, 669, 671.

Petitioners contend that *Bearden* limits the requirement to consider alternatives to incarceration to cases in which the probationer unintentionally violates his probation. Br. at 24. Justice O'Connor noted, however, that "fault" was a relevant consideration only in cases which presented facts which resembled Bearden's peculiar predicament. 461 U.S. at 668 n.9. Even if one assumes that petitioners' contention is correct, *Romano* was still properly decided because nothing in the record suggests that Romano's alleged probation violation of negligently striking his friend with his car in a dark parking lot was an intentional act. Automobile accidents are unfortunate everyday occurrences. Individuals who are involved in isolated car accidents should not be condemned as possessing antisocial personalities which threaten the welfare of society.

The *Bearden* Court purposesly chose not to establish a rule of law which would alter its *Morrissey/Gagnon*

requirement that judges consider alternatives to incarceration before revoking probation. *Id. Romano* presents the Court with this opportunity. Before a test can be constructed, however, this Court must examine the policies underlying probation and the competing due process interests involved in the trial court's decision to revoke probation.

E. Due Process Must Protect The Mutual Interests Of The Probationer, State, And Society In Allowing Probationers To Successfully Complete Their Probation Terms.

Judge Whipple's initial decision to place Romano on probation triggered his due process rights. "The decision to place the defendant on probation . . . reflects a determination by the sentencing court that the State's penological interests do not require imprisonment." *Bearden*, 461 U.S. at 670. Probation primarily satisfies the state's interests in rehabilitating and supervising a criminal offender in the community. *See Gagnon*, 411 U.S. at 784-85.

The experts also emphasize the "rehabilitative-reintegrative" goal of probation. M. Gottfredson, D. Gottfredson, *Decisionmaking in Criminal Justice: Toward the Rational Exercise of Discretion* 212-14 (1980). *See also* N. Cohen and J. Gobert, *The Law of Probation and Parole* 8-12 (1983) [hereinafter cited as *Probation and Parole*]; ABA STANDARDS, Standard 18-2.3, Commentary at 18-74 to 76. The state's penological objectives of deterrence and punishment have minimal importance in the decision to grant probation. *Id.; see also Gagnon*, 411 U.S. at 785 (focus of probation is to achieve rehabilitation, not punitive goals). *Cf.* Mo. Rev. Stat. Section 559.012 (1978) (court may grant probation if institutional confinement is unnecessary for the protection of the public and rehabilitation can be achieved in the

community); *United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 263 (9th Cir. 1975) (*en banc*) (rehabilitation and supervision in the community are policies underlying the Federal Probation Act).

Due process procedures must capture the competing interests of the individual and the state. *Gagnon* recognized that the probationer and state have mutual interests in the "informed use of discretion." 411 U.S. at 785. *See also Romano*, P.A. at 14, 735 F.2d at 322; *see generally Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976) (due process requires this Court to balance the value of additional procedures with the governmental and private interests).

The ABA has identified the mutual objectives which the individual and the state achieve through probation.

> [P]robation is a desirable disposition in appropriate cases for a variety of independent reasons:
>
> (1) it maximizes the liberty of the individual while vindicating the authority of the court;
>
> (2) it eases the reintegration of the offender into the community;
>
> (3) it minimizes the hidden costs that imprisonment places on the family of the offender, in the form of both reduced income and enforced separation; and
>
> (4) it is the most economic form of correctional supervision.

ABA STANDARDS, *supra* Standard 18-2.3, Commentary at 18-75 to 76. This Court must evaluate the strength of Romano's liberty interest and the state and society's interests in ensuring that probation is not unnecessarily or arbitrarily revoked.

1. Romano, The State and Society Have Mutual Interests In Establishing Procedures To Ensure That Probation Is Not Arbitrarily Revoked.

Romano, the state, and society have mutual interests in fair probation revocation procedures which "will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Morrissey*, 408 U.S. at 484 (citing *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections* 83, 88 (1967) [hereinafter cited as *Corrections]*. *See also Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974) ("touchstone of due process is protection of the individual against arbitrary action of government.")[20]

This Court has allowed trial judges to exercise a large amount of discretion in conducting probation revocation hearings. Due process must ensure that judges do not abuse their discretion in the decisionmaking process which is so important to the probationer. *See Lawrence* v. *Smith*, 451 F. Supp. 179, 189 (W.D.N.Y. 1978). As Justice Fortas observed, "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *In re Gault*, 387 U.S. 1, 18 (1967). Requiring sentencing judges to consider alternatives to incarceration protects the probationer, the state and society against arbitrary revocations.

---

[20] Constitutional law scholars have highlighted the importance of the "legitimation" or fairness function of the due process clause. "To perform its dispute-resolution function effectively, American criminal procedure must provide a mechanism that settles the conflict in a manner that induces community respect for the fairness of its processes as well as the reliability of its outcomes." Arenella, *Rethinking the Functions of Criminal Procedure: the Warren and Burger Courts' Competing Ideologies*, 72 GEO. L. REV. 185, 202 (1983).

2. A Probationer's Liberty Interest Corresponds To The High Statistical Probability That He Or She Will Successfully Complete The Probation Term.

The strength of a probationer's liberty interest should be measured by the statistical probability that he or she will successfully complete the probation term. Because Romano's success probabilities were very high, the risk of an unnecessary revocation was also very high. Judge Whipple was, therefore, constitutionally required to consider alternatives to incarceration before deciding to revoke Romano's probation.[21]

---

[21] Probationers have a very high statistical success rate for all offense groups within the federal system: 82.4% in 1980; 81.3% in 1981; 82.3% in 1982; and 81.4% in 1983. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS at 545 (1980), at 539 (1981), at 416-17 (1982), at 416-17 (1983) [hereinafter cited as ANNUAL REPORTS].

A 1977 Missouri study of individuals placed on probation between 1970 and 1972 indicates a 78% success rate. M. Munson, Probation Performance on Assignments to the Missouri Board of Probation and Parole, 1970-1972 (1977). Romano's Eighth Circuit Br., Addendum H (lodged with this Court). A 1983 Missouri study of individuals placed on probation between 1972 and 1974 indicates a 79-80% success rate. J. Barbour, A. Sapp, R. Holden, Offender Performance and Characteristics: Missouri Adult Probation, 1972-74 (Executive Summary) (August 1983). Romano's Eighth Circuit Br. at Addendum I (lodged with this Court) [hereinafter cited as Missouri Adult Probation].

The empirical data also reflect that courts generally continue probation despite the probationer's commission of a minor offense. A "minor offense" is defined as "drunk[eness], disorderly [conduct], petty theft, traffic violation, etc. when sentence is 90 days or less imprisonment, or 1 year or less probation, or a fine." ANNUAL REPORTS, *supra*. Romano's careless driving conviction would fall into the "minor offense" classification. According to the federal statistics, the percentage of probations revoked for "minor" offenses was 2.0% in 1980; 1.8% in 1981; 1.4% in 1982; and 1.5% in 1983.

3. Trial Courts Which Order Incarceration By Precipitously Revoking Probation Will Increase The Likelihood That The Probationer Will Become a Recidivist.

Sociological studies support the view that incarcerated individuals have a higher recidivism rate than probationers who have never been incarcerated. ABA STANDARDS, *supra* Standard 18-2.3, Commentary at 18-76 (citing sociological studies). *See also Corrections*, *supra* at 28. Moreover, some experts maintain that prison is criminogenic, increasing an inmate's probability of recidivism. *Id.* at n.8.[22] This Court should consider this empirical data in balancing the due process interests at stake in the case at bar.

4. The High Costs of Incarceration And Overcrowded Prisons Reflect The State And Society's Interest In Requiring Judges To Carefully Consider Alternatives To Incarceration Before Revoking Probation.

The average annual cost in 1983 of incarcerating one adult prisoner was $13,000 in a federal prison and $5,000 to $23,000 in a state prison. These costs should be com-

---

ANNUAL REPORTS, *supra*. A 1983 Missouri study found that 19.3% of the probationers who successfully completed their probation terms had been continued on probation despite a violation or minor conviction. Missouri Adult Probation, *supra*.

This empirical evidence signifies the strength of Romano's liberty interest. It also reflects the need for this Court to require the necessary due process procedures to protect Romano's liberty.

[22] In *United States* v. *Murray*, 275 U.S. 347, 357 (1928), this Court observed that a salutary aspect of probation is to give "young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment."

pared with the average annual cost in 1983 to supervise one adult prisoner on federal probation or parole ($1,300) or state probation and parole ($220 to $1,700). BUREAU OF JUSTICE STATISTICS, PUB. NO. NCJ-87068, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 92 (1983) [hereinafter cited as REPORT ON CRIME AND JUSTICE]. Some authorities have estimated that incarceration is ten times more expensive per inmate to administer than probation. A. Campbell, *Law of Sentencing* 74 (1978) (cited in *Probation and Parole, supra* at 11); *see also United States* v. *Reed*, 573 F.2d 1020, 1024 (8th Cir. 1978) (court must evaluate the costs of imprisonment vs. costs of probation).

The cost of imprisonment is exacerbated in light of prison overcrowding. The ABA has observed that "[p]risons operate in excess of their capabilities and in many cases close to the limits tolerated by the Eighth Amendment." ABA STANDARDS, *supra* Standard 18-2.3, Commentary at 18-77 to 78. Recent empirical data support the ABA's conclusion. BUREAU OF JUSTICE STATISTICS BULLETIN, PUB. NO. NCJ-92949, PRISONERS IN 1983, (April, 1984)[23] [hereinafter PRISONERS].

The state and society have a great incentive to limit the staggering fiscal and social costs of unnecessary imprisonment. Due process procedures must ensure that judges do not arbitrarily revoke probation.

---

[23] The Bureau of Justice Statistics evidenced the problem of prison overcrowding with the following statistics for 1983: "[T]he entire prison system in seven States (and all male penal facilities in one additional State) were operating under court order; and . . . State and Federal prison systems reported that, on the average, they were operating at about 110% of capacity."

PRISONERS, *supra* at 8.

5. Petitioners Cannot Substantiate Their Claims That The Requirement To Consider Alternatives To Incarceration Before Revoking Probation Will Overburden The State Courts, Cause An Increase In Habeas Petitions, Or Create A Conflict Between The State And Federal Governments.

Petitioners, and the *amici curiae*, complain that requiring trial judges to consider alternatives to incarceration before revoking probation would impose an unfair burden on the state courts. Br. at 10, 25-28; *amici curiae* Br. at 2-5. Petitioners and the *amici curiae*, however, cannot justify their vague and unsubstantiated objections as they overlook the prevailing norm. *See supra* Section I(B).

Justice Marshall has observed that "it is not burdensome to give reasons when reasons exist." *Board of Regents* v. *Roth*, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting). The sentencing court's explanation of alternatives to incarceration will safeguard the probationer's strong liberty interest and also protect the state and society's interest that probation should not be revoked "because of an erroneous evaluation of the need to revoke." *Morrissey*, 408 U.S. at 484.

Petitioners and the *amici curiae* also criticize the alternatives requirement by raising the spectre of federalism. Br. at 10, 25-28, *amici curiae*, Br. at 2-6. But the issues here are fairness and justice, not federalism. The federal and state courts share equal obligations to comply with due process. *See Paul* v. *Davis*, 424 U.S. 693, 702 n.3 (1976) ("[s]urely the Fourteenth Amendment imposes no more stringent requirements upon state officials than does the Fifth upon their federal counterparts.")

Petitioners express unwarranted fears that the federal courts will begin "second guessing" the state court's con-

sideration of alternatives to incarceration. Br. at 27. On the contrary, the Eighth Circuit's decision in *Romano* merely held that trial judges must *consider* alternatives to incarceration. P.A. at 20, 51, 753 F.2d at 323, 567 F. Supp. at 887. If a trial court makes a reasoned explanation of its rejection of alternatives, its decision should be upheld.

Petitioners also erroneously claim that if this Court affirms *Romano*, the state and federal courts will receive an avalanche of habeas petitions. Br. at 27-28. This Court decided *Gagnon* almost twelve years ago. The courts have experienced little difficulty in handling the relatively few petitions raising due process objections to probation revocation hearings.

6. If This Court Does Not Affirm Romano, Trial Courts May Begin To Revoke Probations For Any Violation, Jeopardizing The Future Of The Probation System.

Probation is the most frequently ordered correctional disposition in the United States. REPORT ON CRIME AND JUSTICE, *supra* at 73. At the conclusion of 1983, 1,502,247 adults in this country were probationers. BUREAU OF JUSTICE STATISTICS BULLETIN, PUB. NO. NCJ-94776, PROBATION AND PAROLE 1983 at 1 (September, 1984).

If judges automatically revoked probation for any violation, the probation system would not survive. Countless individuals would be unnecessarily incarcerated, creating a serious social and fiscal crisis. This Court must, therefore, continue to require due process protections for revocation proceedings to safeguard the integrity of the probation system.

F. Trial Courts Should Consider Alternatives To Incarceration Before Revoking Probation Unless The Conduct Which Constitutes The Probation Violation Compels The Court To Conclude That The Probationer Can No Longer Be Rehabilitated Or Supervised In The Community.

After balancing the interests of the probationer, state, and society, this Court may construct a due process test to safeguard against unfairness in the trial judge's probation revocation decision. *Bearden* suggests that a court need not consider alternatives to incarceration for all probation violations. Thus, if an indigent probationer willfully refuses to make the required restitution, a court may revoke probation without considering alternatives to incarceration. 461 U.S. at 672. *Bearden*'s holding, however, is limited to its facts. *Id.*

The Eighth Circuit in *Romano* similarly opined that it "did not intend any rigid formula for determining what constitutes adequate consideration of alternatives to incarceration, but instead anticipated case-by-case analyses." P.A. at 15-16, 735 F.2d at 322. The Missouri Supreme Court followed the same logic when it implied that the trial court's failure to consider alternatives to incarceration may be harmless if the "alleged violation was [a] commission of a major crime or a crime similar to that for which the probationer was originally convicted. . . ." *Abel*, 574 S.W.2d at 417.

Romano gives this Court the opportunity to define the limits of its holdings in *Morrissey* and *Gagnon* by offering guidance to trial courts as to their duty to consider alternatives to incarceration. Respondent respectfully proposes the following rule of law, based on the policies underlying probation, which will prevent trial courts from arbitrarily revoking probation.

> A judge or hearing officer must make a reasoned explanation on the record of the viability of alterna-

> tives to incarceration before revoking probation[24] for all probation violations unless the conduct which constitutes the probation violation, viewed in the context of the probationer's underlying crime and the conditions of probation, compels the court or hearing officer to conclude that the probationer can no longer be rehabilitated or supervised in the community and that the state's interests in punishment and deterrence require the probationer to be incarcerated.[25]

---

[24] Alternatives to incarceration may only require continuation of the probation term without additional conditions but may also include additional conditions to the probation agreement which relate to the conduct involved in the probation violation. *See supra* n.15.

[25] If this Court wishes to emphasize the requirement that the trial judge state "reasons" rather than "alternatives," it is respectfully submitted that this Court may adopt an alternative rule of law:

> Before revoking probation, a judge or hearing officer must make a reasoned explanation on the record as to whether the conduct which constitutes the probation violation indicates that the probationer can no longer be rehabilitated or supervised in the community and must, therefore, be incarcerated. The judge or hearing officer, however, need not explain on the record his or her reasons for revoking probation if the conduct which constitutes the probation violation, viewed in the context of the probationer's underlying crime and conditions of probation, compels the judge or hearing officer to conclude that the probationer can no longer be rehabilitated or supervised in the community and that the state's interest in punishment and deterrence requires the probationer to be incarcerated.

This Court may offer clearer guidance to trial courts by requiring that alternatives to incarceration be considered for *all* probation violations. Adopting the harmless/prejudicial error standard of review will protect the state when a court does not consider alternatives in a case where incarceration is the only viable alternative. *See Chapman* v. *California*, 386 U.S. 18 (1967) (adopting the harmless/prejudicial error standard of review for constitutional errors); *Kartman* v. *Parratt*, 535 F.2d 450, 457-58 (8th Cir. 1976) (harmless/prejudicial error rule applied to cure constitutional error probation revocation proceeding). Respondent respectfully proposes the following rule of law which incorporates the harmless/prejudicial standard:

> A judge or hearing officer must consider on the record alternatives to incarceration before revoking probation for all probation

Cf. Romano, P.A. at 21, 735 F.2d at 323 ("the facts *do not compel* a conclusion that Romano's effort at rehabilitation had failed or that he represented a danger to himself or to society.") (emphasis added).

Applying this rule to the case at bar, this Court should conclude that Judge Whipple had a duty to consider alternatives to incarceration before revoking Romano's probation. The conduct which constituted Romano's probation violation did not reflect that Romano represented a danger to the community or that he had acquired an antisocial personality and must, therefore, be incarcerated for twenty years. Romano's conduct did not compel the conclusion that he could no longer be rehabilitated or supervised in the community.

The trial court should focus on the *conduct* constituting the probation violation and disregard the state's decision to convert the violation into a "crime."[26] Probation viola-

---

violations. If the judge or hearing officer fails to consider alternatives, the decision may be reviewed under the harmless/prejudicial error standard of review. The failure to consider alternatives to incarceration is harmless if the state can prove that the conduct which constituted the probation violation, viewed in the context of the probationer's underlying crime and the conditions of probation, compelled the court or hearing officer to conclude that the probationer could no longer be rehabilitated or supervised in the community and that the state's interests in punishment and deterrence required the probationer to be incarcerated.

Under *Bearden*, prejudicial error only exists if the court revokes probation without considering alternatives to incarceration for a probationer who is too indigent to make the required restitution.

[26] The state ultimately punished Romano for his "criminal" conduct by convicting him of careless driving and fining him $100. Judge Whipple's revocation decision should not represent additional punishment for Romano's driving offense. As one expert has observed, "[i]f the probationer's violation is a new crime, it is illogical . . . to impose additional punishment (imprisonment) for the original crime, which is not made any more reprehensible by the later crime." *Clarke*, *supra* at 413.

tions include criminal and non-criminal (or technical) offenses. Technical offenses may, in some instances, create a stronger basis for revocation and incarceration than minor criminal offenses. For example, a probationer who absconds from supervision reflects a greater inability to rehabilitate in the community than a probationer, like Romano, who carelessly drives an automobile. Judge Whipple's characterization of Romano's conduct as constituting the crime of leaving the scene of an accident was, therefore, irrelevant to his revocation decision.

G. Alternatives To Incarceration Should Be Considered In Administrative And Judicial Probation Revocation Proceedings.

Due process requires that alternatives to incarceration be considered in both administrative and judicial probation revocation proceedings. *Morrissey* and *Gagnon* require the consideration of alternatives in administrative revocation hearings. *Bearden* requires the consideration of alternatives in a judicial revocation proceeding. *Cf. Kent* v. *United States*, 383 U.S. 541 (1966) (due process requires juvenile court judges to make a written statement of reasons before waiving jurisdiction); *Moore* v. *Stamps*, 507 S.W.2d 939, 950 (Mo. Ct. App. 1974) (*en banc*) (in applying *Gagnon's* due process requirements to Missouri's judicial probation revocation procedures, the court held that the judge must make a "written statement . . . [of] the reasons for revoking probation.") A court is better able than an administrative body to comply with a procedural rule requiring written findings. An anomalous result would occur, therefore, if this Court accepted petitioners' suggestion, Br. at 22-23, that due process does

not require a court to consider alternatives in a probation revocation proceeding.[27]

H. Sentencing And Probation Revocation Proceedings Are Constitutionally Distinguishable And Involve Different Factual Issues.

Petitioners erroneously equate sentencing and probation revocation proceedings. Br. at 21-25. The proceedings are constitutionally distinguishable and involve different factual issues.

A criminal conviction constitutionally deprives an individual of his liberty. *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976). A judge, therefore, need not follow a prescribed set of procedural due process rules in a sentencing hearing. By granting probation to a convicted defendant, however, the court restores to the defendant conditional liberty which is protected by due process. *Bearden*, 660 U.S. at 670-71; *Gagnon*, 411 U.S. at 662. A trial court must, therefore, comply with due process, which includes the duty to consider alternatives to incarceration, before revoking a probationer's "significant" liberty interest. *Id.*

Sentencing and probation revocation proceedings also involve different factual inquiries. A judge considers numerous factors before deciding on the appropriate sentence. *See, e.g.*, Br. at 25, n.4 (list of eleven factors) (citing *Probation and Parole* at Sections 2.06-2.27). A judge who

---

[27] Petitioners argue that judges, as distinguished from administrative hearing officers, need not consider alternatives in a revocation proceeding because they have already considered alternatives at the sentencing hearing. Even if one assumes that the sentencing judge will always preside over the revocation proceeding, petitioners' logic is faulty. Petitioners erroneously equate the sentencing and revocation decisions which have significantly different legal and factual characteristics. *See infra* § H.

presides at a revocation hearing, however, only decides the issue of whether the probation violation indicates that the probationer can no longer be rehabilitated or supervised in the community and must, therefore, be incarcerated. Contrary to petitioners' suggestion, Br. at 24-25, the revocation judge does not consider the myriad factors involved in the initial sentencing decision.

Reasons are a bulwark against arbitrariness. The due process requirement that a judge consider the principles underlying probation and the viability of alternatives to incarceration guarantee that the decisionmaking process is not based on purely subjective considerations.

I. The Requirement That A Judge Consider Alternatives To Incarceration Should Be Distinguished From The Probationer's Duty To Present Mitigating Evidence.

Contrary to petitioners' assertions, Br. at 19-20, the trial court has the duty to consider alternatives to incarceration, while the probationer (or his attorney) has the duty to present mitigating evidence at a revocation hearing. *Gagnon* discussed alternatives to incarceration in the context of what a court must consider in its decisionmaking process. 411 U.S. at 784-86. *See also Bearden*, 461 U.S. at 673 n.12. ("[T]he *sentencing court* must focus . . . in probation revocation hearings . . . [on] whether non-imprisonment alternatives are adequate. . . .") (emphasis added). On the other hand, *Gagnon* discussed the probationer's right to present mitigating evidence in the context of whether the probationer had a right to appointed counsel. 411 U.S. at 787, 790.

In the case at bar, Romano's attorneys presented the substantial mitigating evidence surrounding his probation violation. Judge Whipple had a duty to evaluate his evidence in determining whether alternatives to incarceration were appropriate. In *Romano*, as in most

revocation hearings, the alternatives were obvious and counsel would not have assisted the court by presenting evidence of their existence.

J. Notwithstanding The Requirement To Consider Alternatives To Incarceration, Judge Whipple Abused His Discretion In Revoking Romano's Probation And Executing A Twenty Year Prison Sentence.

Even if one assumes that a trial court has no constitutional duty to consider alternatives to incarceration, *Romano* should still be affirmed. In *Burns* v. *United States*, 287 U.S. 216, 222-23 (1932),[28] this Court applied the "abuse of discretion" standard of review to probation revocation proceedings. Judge Whipple abused his discretion by arbitrarily revoking Romano's probation and imposing a twenty year prison sentence because:

(1) the conduct which constituted the probation violation had no rational relationship to Romano's marijuana conviction and special conditions of probation; and

---

[28] The *Burns* Court stated that judicial discretion "implies conscientious judgment, not arbitrary action . . . [and] takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result,' " 287 U.S. at 222-23. The "abuse of discretion" standard of review is based on the fourteenth amendment's guarantee of fundamental fairness under the due process clause. *See Wolff* v. *McDonnell*, 418 U.S. at 558.

This Court has overturned probation and parole revocation decisions based on the kind of tenuous evidentiary support which exists in the case at bar. *See, e.g., Douglas* v. *Buder*, 412 U.S. 430 (1973) (*per curiam*) (probation revocation based on traffic offense was "totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment"); *Arciniega* v. *Freeman*, 404 U.S. 4 (1971) (*per curiam*) (reversal of parole revocation for not constituting "satisfactory evidence" of a parole violation based on parolee's association with other ex-convicts at place of employment).

(2) Judge Whipple failed to consider the substantial mitigating evidence involved in Romano's probation violation.

Judge Whipple ignored substantial mitigating evidence which indicated that he should not have revoked Romano's probation. Romano had not committed any serious criminal violation for the twenty eight month period between his arrest and his sentencing hearing. More importantly, Romano's post-accident behavior indicated that he did not intend to avoid responsibility for his conduct relating to the traffic accident.

K. The District Court And The Eighth Circuit Applied The Correct Standard Of Review And Properly Decided Not To Order An Evidentiary Hearing To Give The Missouri Trial Judge An Opportunity To Supplement The Record And Cure The Constitutional Errors In His Decision To Revoke Probation.

To support their federalism bogeyman, petitioners contend the lower courts improperly "shifted the burden of proof" to petitioners. Br. at 28-34. The record and opinions below do not support petitioners' illusory argument.

Neither the district court nor the Eighth Circuit intruded upon Judge Whipple's factual findings.[29] Indeed, both lower courts accepted as true Judge Whipple's questionable finding that Romano was the driver of the automobile which struck Bradley. P.A. at 6, 43, 735 F.2d at 320, 567 F. Supp. at 885. The lower courts held, however,

---

[29] The Eighth Circuit exhibited great deference to the Missouri courts by dismissing without prejudice Romano's first federal habeas claim because Romano failed to exhaust his state remedies. *Romano* v. *Wyrick*, 681 F.2d 555, 556 (8th Cir. 1982). Despite the Eighth Circuit's opinion, the Missouri Supreme Court refused to hear Romano's meritorious claims. R. at 79-80.

that Judge Whipple's failure to consider alternatives to incarceration violated due process. P.A. at 20-23, 47-48, 735 F.2d at 323, 567 F. Supp at 886.

Petitioners misunderstand the plain language of 28 U.S.C. Section 2254(d). The federal courts have no statutory obligation to defer to Judge Whipple's decision for two reasons:

(1) Judge Whipple made no factual findings as to the viability of alternatives to incarceration before revoking Romano's probation. 28 U.S.C. Section 2254(d)(1), (2), (3), (6), and (8); and

(2) The question of whether Judge Whipple should have given Romano an alternative to incarceration is a question involving Romano's due process rights, concerning which no deference need be given to the state court's finding. 28 U.S.C. Section 2254(d)(7).

Even if one were to consider that the question of alternatives to incarceration is a mixed question of law and fact, this Court has held that such questions may be reviewed independently under 28 U.S.C. Section 2254. *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982).

Petitioners further argue that the district court should have held an evidentiary hearing to determine if Judge Whipple mentally considered alternatives to incarceration before revoking Romano's probation. Br. at 28-30. Petitioners cannot support this argument with any authority. Petitioners have conceded that the probation revocation transcript reflects that Judge Whipple failed to give even the slightest attention to alternatives to incarceration on the record. Petitioners' Eighth Circuit Br. at 1-2 (lodged with this Court). A fundamental and axiomatic principle of appellate jurisdiction is that a trial judge may not supplement an extensive record to cure errors after he has relinquished jurisdiction over the case.

II. THE DISTRICT COURT AND THE EIGHTH CIRCUIT WERE CORRECT IN ORDERING RESPONDENT RELEASED FROM ALL CUSTODY AND IN NOT ALLOWING PETITIONERS TO HOLD A NEW, RETROSPECTIVE PROBATION REVOCATION HEARING, AFTER RESPONDENT'S PROBATION TERM HAS ALREADY EXPIRED UNDER MISSOURI LAW, TO CURE A CONSTITUTIONAL DEFECT THAT OCCURRED IN RESPONDENT'S PROBATION REVOCATION HEARING ALMOST EIGHT YEARS AGO.

A. Missouri Law Supports The Lower Courts' Orders Releasing Romano From All Further Custody.

After finding that Romano's probation revocation hearing was unconstitutional, the district court and Eighth Circuit were correct in ordering Romano's unconditional release from all further custody. Inasmuch as Judge Whipple's probation revocation order was unconstitutional, and, therefore, a nullity, Romano's five year probation term,[30] which commenced on April 13, 1977, expired on April 13, 1982. The State of Missouri no longer has the jurisdiction or custody over Romano's person necessary to conduct a new revocation hearing. The lower courts, therefore, were required to order his release.

The applicable Missouri statute requires Romano's release from custody upon the expiration of his probation term. Mo. Rev. Stat. Section 549.111.1 (1963, as amended 1967) (repealed by L. 1977, at 658, eff. Jan. 1, 1979) (the applicable law at the time of Romano's revocation hearing), states that when a probationer has successfully completed his probation term, "[h]e shall automatically be

---

[30] Petitioners erroneously contend, contrary to the record and Missouri law, that Judge Whipple placed Romano on a ten year probation. *See supra* note 1.

absolutely discharged from the probation and from the supervision of the Board of Probation and Parole. . . ." Romano successfully completed his probation term in jail. He must, therefore, be released as provided by Missouri law.[31]

Several state courts, addressing the precise remedial issue which the court below decided, have held that a state may *not* hold a new probation revocation hearing to cure a procedural defect in a former hearing after an individual's probation term has already expired. *People* v. *Amsbary*, 51 Cal. App.3d 75, 78-79 (1975); *Cook* v. *Commonwealth*, 176 S.E.2d 815, 818 (Va. 1970); *State ex rel. Strickland* v. *Melton*, 165 S.E.2d 90, 97 (W.Va. 1968); *Haney* v. *Eyman*, 399 P.2d 905, 907 (Ariz. 1965) (*en banc*).

B. Due Process Prevents The Missouri Courts From Holding A Retrospective Probation Revocation Hearing To Consider Events Which Occurred Almost Eight Years Ago.

Morrissey held that due process requires that "[t]he revocation hearing must be tendered within a reasonable time after the parolee is taken into custody." 408 U.S. at 488. In holding that a two month delay was acceptable, *id.*, this Court implied that a delay of multiple years would be unacceptable. Lower courts have also evaluated the permissible length of the delay in holding a revocation

---

[31] Respondent presented to the lower courts the arguments relating to his remedial rights under Missouri law. This Court has deferred to the lower courts' interpretation of state law questions. *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979) ("The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local counsel would dispose of comparable issues.").

hearing in terms of months. *See, e.g., Marchand* v. *Director, U.S. Probation Office*, 421 F.2d 331, 335 n.5 (1st Cir. 1970) (courts will not tolerate a delay which exceeds three months).

In discussing the sixth amendment right to a speedy trial, this Court held that judges must balance four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972). If the *Barker* test is applied to the case at bar, Romano should be released. *See United States ex rel. Sims* v. *Sieloff*, 563 F.2d 821, 828 (7th Cir. 1977) (*Barker's* test for sixth amendment prejudicial delay should be applied to evaluate delay in parole revocation proceedings).

First, Romano aggressively asserted his post-conviction rights. Romano filed his first *pro se* motion for relief with the Missouri courts on March 28, 1980. The Missouri courts had more than two years in which to cure the errors in Romano's original probation revocation hearing. But the record reflects that Romano was bounced around for years in the Missouri courts which denied all of Romano's petitions. None of the Missouri courts—at the trial, appellate, or Supreme Court levels—even once considered the merits of Romano's case.

Second, the state caused the delay in the adjudication of Romano's claims. On July 14, 1980, Romano filed a state habeas petition which alleged that Judge Whipple failed to consider alternatives to incarceration before revoking Romano's probation. R. at 58-62. Petitioners concede that a Missouri trial judge not only denied Romano's petition on improper procedural grounds, but also directed Romano to file a procedurally inappropriate post-conviction relief motion. Pet. at 3. This single mistake cost Romano almost three years of his life in the Missouri penitentiaries.

Finally, the eight year delay has significantly prejudiced Romano. The *Barker* Court identified three factors which constitute "prejudice" to the defendant: (1) "oppressive incarceration"; (2) "anxiety and concern"; and (3) "the possibility that the defense will be impaired." 407 U.S. at 532.

One cannot possibly express the oppression, anxiety, and sheer horror which Romano experienced during his five and one-half years of unconstitutional confinement in Missouri's most dangerous penitentiaries. The Eighth Circuit and the district court properly refused "to blind [themselves] to the time Romano had served in the custody of the State of Missouri." P.A. at 25, 735 F.2d at 324.

Romano's defense will also be impaired if he is required to undergo a retrospective probation revocation hearing. Romano's alleged probation violation occurred almost eight years ago. It would be impractical and unfair to allow the State of Missouri an opportunity to conduct a retrospective hearing. The trial court can only fairly consider the question of alternatives to incarceration in the context of the fresh facts and mitigating circumstances surrounding the probation violation. A gross injustice would result if this Court allows the Missouri trial court to consider alternatives to incarceration for Romano in a historical vacuum. *Cf. Drope* v. *Missouri*, 420 U.S. 162, 183 (1975) (due process precludes retrospective hearing to evaluate defendant's mental competency for trial which occurred six years earlier).[32]

---

[32] If a court finds that the probation or parole board made an arbitrary revocation decision, it may also refuse to allow the state to conduct a new hearing. *See, e.g., Caton* v. *Smith*, 486 F.2d 733, 736 (7th Cir. 1973).

Petitioners argue that Romano's time of incarceration should not satisfy Romano's probation obligation. Br. at 37. District Judge Cahill observed that "the rigors and stress associated with imprisonment are far greater than those on probation." P.A. at 53, 567 F. Supp. at 887. This Court has also observed that an individual may serve his probation term in jail. *Burns* v. *United States*, 287 U.S. 216, 223 (1932).

In *Iasigi* v. *Van De Carr*, 166 U.S. 391 (1897) (cited by *Romano*, P.A. at 26, 735 F.2d at 324), this Court noted that the federal courts may exercise "discretion" "as law and justice require" in deciding upon a proper habeas remedy. 166 U.S. at 393, 395. The current habeas statute embodies the same policies expressing in *Iasigi*. The federal habeas statute allows a federal court broad discretion in fashioning a remedy under a writ of habeas corpus. "[T]he Court shall . . . dispose of the matter as law and justice require." 28 U.S.C. Section 2243. Justice requires the State of Missouri to release Romano from all further custody.

CONCLUSION

This Court should affirm the decisions of the district court and the Eighth Circuit Court of Appeals.

Respectfully submitted,

Of Counsel:
ARMSTRONG, TEASDALE, KRAMER & VAUGHAN

/s/JORDAN B. CHERRICK
611 Olive Street
Suite 1900
St. Louis, Missouri 63101
Telephone: (314) 621-5070
Counsel of Record for Respondent (Appointed by this Court)

APPENDIX

APPENDIX

Relevant Missouri Statutory Authorities

Mo. Rev. Stat. § 559.012 (1978)

Eligible for probation, when.

The court may place a person on probation for a specific period upon conviction of any offense or upon suspending imposition of sentence if, having regard to the nature and circumstances of the offense and to the history and character of the defendant, the court is of the opinion that

(1) Institutional confinement of the defendant is not necessary for the protection of the public; and

(2) The defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision.

Mo. Rev. Stat. § 549.071.1 (1963, as amended 1967) repealed by L. 1982, at 438, § A.

Parole and probation may be granted, when—terms, length of—extensions.

1. When any person of previous good character is convicted of any crime and commitment to the state department of corrections or other confinement or fine is assessed as the punishment therefor, the court before whom the conviction was had, if satisfied that the defendant, if permitted to go at large, would not again violate the law, may in its discretion, by order of record, suspend the imposition of sentence or may pronounce sentence and suspend the execution thereof and may also place the defendant on probation upon such conditions as the court sees fit to impose. The probation shall be for a specific term which shall be stipulated in the order of record. In the case of a felony offense no probation under this chapter shall be granted for a term of less than one year, and no probation shall be granted for a term of longer than five years. In the case of a misdemeanor offense no probation shall be

granted for a term of longer than two years. The court may extend the term of probation, but no more than one extension of any probation may be ordered.

Mo. Rev. Stat. § 549.101.1 (1963, as amended 1965) repealed by L. 1977, at 658, § 1, eff. Jan. 1, 1979

Arrest of person on probation or parole—revocation of probation or parole—costs—second probation or parole.

1. The court granting probation or parole may at any time before order of discharge without notice to the defendant order his apprehension by the issuance of a warrant for his arrest and his appearance in court forthwith. Any probation or parole officer assigned to or serving the court or judge having jurisdiction may arrest such defendant without a warrant, or may deputize any other officer with power of arrest to do so by giving him a written statement setting forth that the defendant has, in the judgment of the probation officer, violated the conditions of his probation. The written statement delivered with the defendant by the arresting officer to the official in charge of a county jail or other place of detention shall be sufficient warrant for the detention of the defendant. After making an arrest the probation officer shall present to the detaining authorities a similar statement of the circumstances of violation. The court may in its discretion, with or without hearing, order the probation or parole revoked and direct that the sentence theretofore imposed be commenced and order execution thereof or in the event imposition of sentence was suspended the court may pronounce sentence and order execution thereof. The court may in its discretion order the continuance of the probation or parole upon such conditions as the court may prescribe. The court in its discretion may order the allowance in mitigation of the sentence credit for all or for part of the time defendant was upon probation or parole.

2. After the probation or parole has been revoked, as provided in subsection 1, the court may in its discretion require the payment of all costs in the case and may grant a second probation or parole, but no more than two probations or paroles shall be granted the same person under the same judgment or conviction.

Mo. Rev. Stat. § 549.111.1 (1963, as amended 1967) repealed by L. 1977, p. 658, § 1, eff. Jan. 1, 1979.

Absolute discharge of person on probation or parole—citizenship restored—order of discharge to indicate restoration of rights.

1. When a defendant who has been placed upon probation or parole for the term prescribed by the court, and the court granting the probation or parole is satisfied that the reformation of the defendant is complete and that he will not again violate the law, the court shall, by order of record, grant his absolute discharge. When a defendant has completed the term of probation prescribed by the court, if the original order of probation has not been amended, modified, extended or revoked by the court, he shall automatically be absolutely discharged from the probation and from the supervision of the board of probation and parole and the court shall so note by order of record. The order operates as a complete satisfaction of the original judgment by which the fine or jail sentence or commitment to the state department of corrections was imposed or suspended.